93-216

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PAUL P. SLAWEK,

PETITIONER,

V.

GATEWAY BROADCASTING CORP., ET AL.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a cause of action in RICO exist or Civil Rights §1983 when allegations were made that a Bankruptcy Ring existed for several years, in the United States Bankruptcy Court in the City of Camden, New Jersey, when the purpose of the ring was to extract false and inflated professional fees from Debtors and Creditors seeking the relief provided under the United States Bankruptcy Code, and when allegations were made that there were many victims of the ring and that members of the ring were aided and abetted by the Bankruptcy Judge and utilized various professional corporations to further their conspiracy and allegations were made that multiple acts whereby false, fraudulent and inflated professional fee invoices were submitted via the United States Postal Service from

New Jersey to Pennsylvania and further allegations were made that the existence of the ring created a serious societal threat and where plaintiff has sustained losses as a result of the ring?

Does Federal Diversity Jurisdiction exist when plaintiff alleged diversity of citizenship and an amount in controversy over $50,000, but where it was later discovered that one of the defendants was non-diverse, (The Atlantic City Press), and plaintiff was judicially granted leave to dismiss the charges founded on diversity jurisdiction as to the non-diverse defendant, and subsequently the case was transferred to Camden, New Jersey and where plaintiff was also judicially granted leave to file an amended complaint to correct a misnomer as to one of the defendants?

Does an amended complaint reinstate a non-diverse defendant to a cause of action, when that defendant had been previously judicially dismissed in order to preserve diversity jurisdiction?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT..... 1

OPINIONS BELOW..... 2

JURISDICTION..... 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 10

CONCLUSION..... 26

INDEX TO APPENDICES

Appendix A	Order of the United States District Court for the Eastern District of Pennsylvania.
Appendix B	United States Magistrates RICO Case Order for the District Court for the District COurt of New Jersey.
Appendix C	Order of the District Court for the District of New Jersey.
Appendix D	United States Magistrates Letter and Opinion Order of the District Court for the District of New Jersey.
Appendix E.	Order of the District Court for the District of New Jersey.
Appendix F	Memorandum Opinion of the Court of Appeals.
Appendix G	Court of Appeals Denial of Petition for Rehearing (issued April 7, 1993).
Appendix H	Title 18 section 1961-1968.
Appendix I	Title 42 section 1983.

Appendix J Title 28 section 1332.

Appendix K Article III Section 2 to the United States Constitution.

TABLE OF AUTHORITIES CITED

CASES:

Marshall-Silver Construction Co., Inc., v. Mark Mendel, 894 F2d 593 (3rd CT 1990).....16

Sedima, SPRL v. Imprex, Co., Inc., 473 U.S. 479 (1985).....20,21

STATUTES:

United States Code
Title 18, Section 1961-1968.....16

Title 42, Section 1983.....9,10,26

Title 28, Section 1332.....4

United States Constitution
Article III Section 2.....4

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PAUL P. SLAWEK-PETITIONER

vs.

GATEWAY BROADCASTING CORP., ET AL.RESPONDENT[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Paul Slawek, M.D., J.D., respectfully prays that a writ of

[1] The Caption of the original complaint reads Paul Slawek v. Gateway Broadcasting Corporation; Atlantic City Press, Cape May Star and Wave; Joy105 Radio WBNJ; Wallaces Anchorage Associates; Township of Lower, New Jersey; Lower Township Utility Authority; Thomas Wallace, and his Wife; George Wallace, and his Wife; Daniel Hill; John Hobson; Eric Browndorf; Micheal Sinko; Paul Merkoski; Bill Huf; Scott Wohl; Joseph Isabell; Joan Taylor; Fred Benson, Ralph Cooper; James Fitzpatrick

certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit dismissing petitioners complaint for failure to properly allege a RICO cause of action and or a Section 1983 cause of action and for lack of diversity jurisdiction.

OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Pennsylvania, entered January 22, 1990 appears in Appendix A to this Petition. The RICO Case Order of the United States Magistrate for the District Court for the District Court of New Jersey entered on April 16, 1991 appears in Appendix B to this petition. The Order of the District Court for the District of New Jersey entered on December 9, 1991 appears in Appendix C to this petition. The Order of

the District Court for the District of New Jersey, entered May 14, 1993 appears in Appendix D to this petition. The Letter and Opinion Order of the United States Magistrate of the District Court for the District of New Jersey entered January 16, 1992 appears in Appendix E to this petition. The Memorandum Opinion of the Court of Appeals filed February 26, 1993 appears in Appendix F to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on February 26, 1993. A timely Petition for Rehearing was filed on March 12, 1993. The Court of Appeals' denial of the Petition for Rehearing was issued on April 7, 1993 and is set forth in Appendix G to this petition. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, U.S.C. §1961-1968 is set forth in Appendix H to this petition. Title 42 U.S.C. §1983 is set forth in Appendix I to this petition. Title 28 U.S.C. § 1332 is set forth in Appendix J to this petition. Article III Section 2 of the United States Constitution is set forth in Appendix K to this petition.

STATEMENT OF THE CASE

Petitioner was managing partner in a partnership that owned and operated a family restaurant in Cape May, New Jersey. Due to events outside his control, petitioner was forced to file, on behalf of the partnership, for protection under Chapter 11 of the United States Bankruptcy Code. The case was assigned to Judge Judith Wizmur. At the time of filing of

the petition, the partnership had less than $600,000.00 in debts and over $1,800,000.00 in assets. A plan of reorganization was confirmed on December 15, 1989. During the course of reorganization, petitioner observed what he believed to be illegal ongoing activities being perpetrated by a group of attorney and other professionals in the bankruptcy court, which were being sanctioned by Judge Wizmur. The attorney's and professionals submitted fraudulent and inflated applications for fees. Said fee applications were invariably approved by Judge Wizmur, despite what were glaring inaccuracies and misrepresentations. (To date Judge Wizmur has approved over $300,000.00 in professional fees.)

Petitioner was under a moral and civic duty to report what he believed to be criminal violations. When petitioner spoke out against the illegal practices, the

defendants herein, aided by Judge Wizmur, conspired to liquidate his business. This was contrary to the purpose and intent of the bankruptcy laws as the business was solvent and the reorganization was complete. More than 500 days after confirmation, the business was converted to a Chapter 7, and liquidated. The restaurant was sold for $1,100,000.00. Despite the fact that this sum of moneys was well in excess of the debts of the business, an additional parcel of land owned by the partnership debtor was also sold. This was contrary and in defiance of debtor's wishes.

The illegal conspiracy involved the mailing of illegal legal fees, the approval of illegal fees, the filing of false affidavits in court, the publication and broadcasting of falsehood about petitioner and the interference with petitioner's

contracts and business relationships as well as the interference with all debtor's seeking protection in the Bankruptcy system in Camden, New Jersey.

On September 10, 1990, Petitioner, a citizen of Pennsylvania filed a complaint in the District Court for the Eastern District of Pennsylvania, against multiple defendants, alleging, inter alia, a broad conspiracy within the United States Bankruptcy Court Bar, for the District of New Jersey, Camden. The purpose of this conspiracy was to submit and to have the bankruptcy court approve false and fraudulent professional fees. The complaint also alleged defamation, fraud, conspiracy, malicious interference with contract obligations, theft by deception, and slander to land title. Federal jurisdiction was based upon diversity and an amount in controversy of in excess of

$50,000.00, and was specifically delineated in petitioner's complaint. Petitioner also alleged in his complaint, that he was damaged by the acts of an illegal, for lack of a better word, "ring", and their co-conspirators. Plaintiff sought in excess of $50,000.00 in damages and none of the defendants were citizens of Pennsylvania.

On January 18, 1991, an order was entered, following a hearing on motions made by the defendants, by the District Court of Pennsylvania, transferring the case to Camden, New Jersey. At said hearing Defendant Atlantic City Press, maintained that it was a Pennsylvania Corporation, in order to maintain Diversity Jurisdiction, all counts of the complaint alleging jurisdiction by reason of diversity against defendant Atlantic City Press were dismissed "in order to preserve

diversity jurisdiction over the remaining defendants." (See Order at Appendix A)

On April 22, 1991, a RICO Case Order was entered by the New Jersey District Court.(See Appendix B) Petitioner filed a timely response to that RICO Case Order and subsequently filed a motion to amend his complaint so as to include as a cause of action, violations of 42 U.S.C. 1983 and 1988 and to correct a misnomer as to one of the defendants.

On December 9, 1991, the United States District Court for the District of New Jersey granted Defendant, Lower Township Municipal Utility Authority's motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6). The District Court judge in his order, (see Appendix C) failed to address the diversity jurisdiction issue and dismissed defendant Lower Township Municipal Utility Authority.

A Letter Opinion and Order was issued on January 16, 1992, by United States Magistrate for the District Court for the District of New Jersey, granting petitioners motion to amend his complaint as to the misnomer but denying the motion as to the Title 42 U.S.C. §1983 and 1988 claims.(See Appendix D)

On May 14, 1992, upon motion made by the remaining defendants, the District Court for the District of New Jersey dismissed the complaint. In his opinion, the District Judge did not address the issue of diversity of citizenship or Title 42 U.S.C. 1983, but only addressed petitioners RICO cause of action. The dismissal of this case is but one of a pattern of constitutional denials inflicted upon plaintiff and his family by the district court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Third Circuit has decided that federal diversity jurisdiction did not lie and that a RICO cause of action did not stand nor did a 1983 action and that finding conflicts with previous decisions of this Court and with the decisions of another Circuit.

RICO ALLEGATIONS WERE SUBSTANTIATED

Plaintiff's pleadings in this case, consisting of a COMPLAINT, an AMENDED COMPLAINT and a RESPONSE to RICO ORDER, contain allegations which give rise to a RICO cause of action. The Court below erred in fact and in law when they did not consider the allegations contained in the RESPONSE TO RICO ORDER which Plaintiff filed in response to the RICO Order entered

by the District Court. Such a RESPONSE TO RICO ORDER, according to New Jersey Federal practice becomes part of the pleadings. The RESPONSE TO RICO ORDER contained clarification of issues contained in the Complaint, (Amended Complaint). It was these clarifications contained in the RESPONSE TO RICO ORDER that the panel failed to consider. The panel did not consider the allegations contained in the RESPONSE TO RICO ORDER which make out the predicate acts of the continuity and relationship which establish a pattern, and Plaintiff's RICO count should not have been dismissed.

Plaintiff's Complaint taken along with the Amended Complaint and the RESPONSE TO RICO ORDER clearly sets forth multiple victims giving rise to a pattern of activity giving rise to a RICO cause of

action. For example, at page 9 of Plaintiff's Complaint, he alleges that the Defendants "have initiated and organized a conspiracy and illegal enterprise within the meaning of Federal RICO." Again and again Plaintiff alleges the pre-existence of an illegal enterprise and conspiracy on the part of the Defendants. In his RESPONSE TO RICO ORDER, Plaintiff discusses the ongoing existence of an "illegal bankruptcy ring" in Camden. (Response to RICO Order, at page 2,3,4,20,35,53,55,56,60)

Plaintiff again discusses how Defendants have submitted false certification in an "attempt to corrupt the judicial process." (RESPONSE TO RICO ORDER at page 6,7,8, and 9) The corruption of the judicial system affects not only the Plaintiff but all creditors, debtors,

employees and a vast number of individual who are in many ways affected by the existence of these illegal and corrupt bankruptcy rings. It is not only the Appellant who is damaged by these acts.

Appellant states at page 10 of his Response to RICO Order:

> "These illegal practices are ongoing within this Bankruptcy Court and pose a serious and continuous threat to those seeking the protection to which they are entitled under the United States Bankruptcy Code. Such practices seriously effect interstate commerce."

and again at page 38 of the same:

> "the operation of an ongoing bankruptcy ring within her Court, the ring has as its objective control of the bankruptcy process, the garnishing of inflated professional fees, control of liquidation of debtor's assets and other methods of self dealing among the control group."

Appellant specifically listed, at part four of the RESPONSE TO RICO ORDER, the victims who are affected by these Defendants'

specific acts against this specific entity, Paul Slawek, Susan Slawek, the partnership entity, Slawek's Anchorage Associates, and *other Debtors and Creditors.* The very existence of an illegal bankruptcy ring implies other victims beyond Plaintiff. Clearly the Plaintiff identified more than one victim and the Court below erred in its conclusion that the RICO Complaint should be dismissed. The Appellant alleged a continuous, long standing program harmful to all debtors and creditors, employees of the business, and posing a serious threat to all who seek bankruptcy protection in Camden. (Response to RICO Order page 48)

Here, Plaintiff clearly states that the practices of these Defendants pose a threat to any one seeking protection in the Camden Bankruptcy system. Additionally, Plaintiff's Complaint along with the RESPONSE TO THE RICO ORDER, clearly allege

the existence pre-existing Bankruptcy Ring in Camden. The kind of activity alleged in the pleadings clearly goes to past and future conduct in the system. The activity is of a nature that is both continuous and ongoing. The type of damage Plaintiff alleges caused and continues to cause damage to creditors, debtors and employees. A bankruptcy ring of this type has many victims, and I believe that the panel erred in law and in fact by not considering these victims in their conclusion that the pleadings only state one victim, the Plaintiff.

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 - 1968, identifies what a plaintiff must allege for a RICO count to stand: 1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity.

Sedima, SPRL v. Imrex, Co., Inc., 473 U.S. 479 (1985).

There exists a threat of continuing activity,. Plaintiff could have proved the multiple predicates alleged, constitute a pattern of racketeering activity, satisfying the requirements of relationship and continuity. Plaintiff sets forth many ways that the Defendants have violated Bankruptcy Law, in an effort to corrupt the judicial process in his Response to RICO Order. The multiple predicate acts are repeated incidents of mail fraud as well as tort principles. These complained of acts are related to the common general purpose of the ring: to extract illegal professional fees and commissions and force retaliatory liquidation, in addition to damaging all those utilizing the Bankruptcy Court and to cause damage to the Plaintiff, in an effort to control his business, *as*

well as to defraud debtors seeking relief in the Camden Bankruptcy Court and to corrupt the Judicial system.

The illegal ring was not put in place to burden this single plaintiff, but had been in place for several years and has been inflicting a great societal harm for several years. Even in a single bankruptcy there are multiple victims. The debtor, the debtor's former employees along with the creditors and citizens alike.

Defendants have orchestrated a most perfect scheme. In Camden Bankruptcy Court there is no adversarial nature to any proceedings. Attorney's for the creditors work together to defraud the debtors, creditors and employees and to corrupt the judicial system which gives rise to a threat of a series of injuries over a significant period of time. RICO was designed to protect legitimate enterprises

and to protect the public from the operation of illegitimate enterprises. It is hard to think of a greater threat to our society than a the corruption of our judicial system.

If Defendants commit at least two acts that have the common purpose of furthering a continuing criminal enterprise with which they are associated, relatedness and continuity are satisfied. Plaintiff claims that these racketeering predicates occurred with some frequency over at least a two year period in regard to this particular case, however the acts against others are ongoing and continuous. The threat of continuing activity exists all along during the racketeering activity therefore the continuity requirement is satisfied.

These racketeering acts are part of a common fraudulent scheme. The continuity and the relationship which combines to

produce a pattern. The defendants behavior here clearly demonstrates a pattern, the same purpose, results, participants, victims and methods of commission. The defendants acts were not merely to defraud this Plaintiff and his creditors and employees, but to cause harm to other victims including any and all debtors and their creditors coming before this corrupted system. This type of fraudulent activity is open-ended.

Defendants constitute an enterprise, they were a group of persons associated together in fact for a common purpose of engaging in a course of conduct. Plaintiffs has alleged that the defendants conducted the enterprise through a pattern of racketeering activity.

Marshall-Silver Construction Co., Inc., v. Mark Mendel, 894 F2d 593 (3rd Ct 1990), involved "a single victim, a single

injury, and a single short-lived scheme with only two active perpetrators," which the Court below found did not pose a threat and did not satisfy the pattern requirement. These allegations contained in Appellant's complaint and Response to RICO Order, do not involve merely a single victim, as was the case in Marshall. Rather Appellant clearly identified other victims; his wife, the business partnership, their creditors, employees and every debtor seeking relief in the Camden Bankruptcy System. A motion to dismiss should only be granted when there are no set of facts which if proved would entitle the plaintiff to relief. The District Court erred in not taking all Plaintiff 's allegations as proven in granting the Defendant's Motion to Dismiss.

DIVERSITY JURISDICTION EXISTS

Additionally the Court below erred in law and fact, in that they failed to address the issue of diversity jurisdiction. Plaintiff's complaint and amended complaint taken along with his RESPONSE TO RICO ORDER alleged that diversity jurisdiction exists. Diversity jurisdiction was alleged in the original complaint, the amount in controversy was in excess of $50,000.00 and Plaintiff was a Pennsylvania resident. All of the Defendants were reasonably believed to be citizens of New Jersey. It was discovered during the course of the litigation, that one of the defendants, the Atlantic City Press, an entity owned by South Jersey Publishing Company, who presumably was a New Jersey Corporation, was in fact a Pennsylvania Corporation.

An Order was entered on January 18, 1991, by the Honorable Norma Shapiro,

dismissing the complaint as to that individual defendant, (Atlantic City Press), "in order to preserve diversity jurisdiction over the remaining defendants." (See Appendix A).

A RESPONSE TO RICO ORDER was then filed by the Appellant in May of 1991. Said Response clarified and supplemented Plaintiff's allegations and became part of the pleadings. A Letter Opinion and Order was entered by Jerome B. Simandle on January 16, 1992 which granted leave to amend the complaint only to properly identify the parties, to reflect merely a change of corporate identities. (See Appendix D). This change in the form of an amended complaint was merely to correct a misnomer of the parties. Plaintiff filed an Amended Complaint in line with Magistrate Simandle's Order of January 29, 1992. Nothing in that Order could be

construed to be in conflict with Judge Shapiro's previous Order dismissing the Atlantic City Press as a diversity defendant. The Atlantic City Press was dismissed as a defendant on January 22, 1991. Plaintiff can not merely by correcting a misnomer be said to have reinstated his claim against this Defendant, and in doing so divest the District Court of its proper diversity jurisdiction over the remaining Defendants.

The Court below erred when they did not address the issue of diversity jurisdiction which raised by Plaintiff in his brief. The District Court did not address the issue of concurrent diversity jurisdiction at all. The Districts Court's dismissal of Plaintiff's Complaint must stand only if no set of facts as plaintiff alleges, if proved, would entitle him or her to relief. Diversity jurisdiction was

alleged at page one, paragraph two of the Plaintiff's original complaint. Honorable Norma Shapiro specifically dismissed defendant Atlantic City Press *to preserve diversity jurisdiction over the remaining defendants*

Diversity jurisdiction exists as a basis for the District Court's jurisdiction and Plaintiff's complaint should not have been dismissed. Instead the District Court stated: "The only basis for this court's jurisdiction is the RICO claim." (See Appendix E). This was clearly error on the part of the District Court, and the Court below erred when they did not reverse this finding.

DISTRICT COURT SHOULD NOT HAVE DISMISSED COMPLAINT AGAINST UTILITY AUTHORITY

Plaintiff's complaint against the Defendant, Lower Township Municipal Utility Authority, was dismissed based upon an

affidavit submitted by an employee of the utility. The submission of the affidavit extended the inquiry of the Defendants' motion to dismiss beyond merely the pleadings. Subsequently, Plaintiff was barred from making any discovery into this matter. I believe that the panel erred in law in allowing the District Court's dismissal of the utility stand. Plaintiff should have been permitted discovery after the District Court accepted the affidavit from the employee of the utility company.

§ 1983 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED

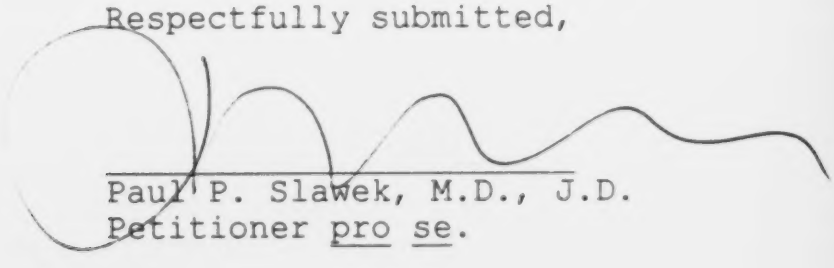
Although, leave was not granted for Plaintiff to amend his complaint to include a §1983 violation, Plaintiff's original complaint sounded in a violation of §1983, and Plaintiff's claim to §1983 violations should not have been dismissed.

CONCLUSION

For the reason set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: July 2, 1993

Respectfully submitted,



Paul P. Slawek, M.D., J.D.
Petitioner pro se.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PAUL P. SLAWEK	:	CIVIL ACTION
	:	
V.	:	
	:	
GATEWAY BROADCASTING CORP. ET AL	:	NO. 90-5823

ORDER

AND NOW, this 18th day of January, 1991, after oral argument held on this date, and it appearing that:

A. Defendant Atlantic City Press is an unincorporated entity owned by the South Jersey Publishing Company, a Pennsylvania Corporation; and

B. Defendant "Joy 105" Radio WBNJ is not a separate legal entity; and

C. The gravamen of this complaint relates to property located in New Jersey; alleged actions taken in New Jersey; and defendants (other than those named above), all of whom reside or are located in New Jersey and all of whom have challenged the jurisdiction of this Court; and

D. Plaintiff has given his consent to have this complaint transferred to the United States District Court in New Jersey where it could have been brought;

It is ORDERED that:

1. All counts of the complaint alleging jurisdiction by reason of diversity against defendant Atlantic City

Press are DISMISSED without prejudice in order to preserve diversity jurisdiction over the remaining defendants.

2. All counts of the complaint against defendant "Joy 105" Radio WBNJ are DISMISSED with prejudice.

3. The complaint is TRANSFERRED pursuant to 28 U.S.C. §1404 (a) to the United States District Court in New Jersey where it could have been brought.

4. All outstanding motions are DENIED AS MOOT without prejudice.

5. The clerk of the court shall transfer this action forthwith.

NORMA L. SHAPIRO
Entered 1/22/90

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL P. SLAWEK Plaintiff	:	
V.	:	Civil Action No. 91-838(R)
GATEWAY BROADCASTING CORP. ET AL Defendants	:	

RICO CASE ORDER
18 U.S.C. §§ 1961-1968

The above-captioned case contains a civil RICO claim, which has been filed in this court pursuant to 18 U.S.C. §§ 1961-1968. This order has been designed to establish a uniform and efficient procedure for processing this case.

The plaintiff shall file, within thirty (30) days hereof, a RICO Case Statement. This Statement is a supplemental pleading which shall include

the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this Statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. § 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim.

A description of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes which are allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. State whether the existence of a "enterprise" is alleged within the meaning of 18 U.S.C. §1961(4). If so, for each such enterprise, provide the following information:

a. State the names of the individuals, partnerships, corporation,

association, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive

instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962 (a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associate with the enterprise.

b. State whether the same entity is both the liable "person" and the "enterprise" under §1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d) describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury an the violation of the RICO statute.

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to the court in processing you RICO claim.

AND IT IS SO ORDERED.

JEROME B.SIMANDLE
UNITED STATES
MAGISTRATE JUDGE

Date: August 16,1991

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL P. SLAWEK Plaintiff	:	Hon. Joseph H. Rodriguez
V.	:	Civil Action No. 91-838
GATEWAY BROADCASTING CORP. ET AL Defendants	:	ORDER

This matter comes before the court on defendant Lower Township Municipal Authority's motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6). For the following reasons, defendant's motion will be granted.

I. INTRODUCTION

The facts of this action, for the purposes of the instant motion, need only be briefly addressed. Plaintiff was the owner and operator of a restaurant located

in a southern New Jersey resort town. According to the complaint, the business experienced some hardships during 1988, and was forced into bankruptcy. The plaintiff/debtor submitted a proposed plan that envisioned full payment to the creditors.

However, according to the complaint, the defendants conspired to commit, inter alia, various offenses against the plaintiff in order to prevent any possibility of a successful bankruptcy re-organization. The plaintiff maintains that a "bankruptcy ring" exists in the Camden vicinage which swindles innocent and unsuspecting debtors out of large amounts of money. Implicated in this nefarious ring is Judge Wizmur of the bankruptcy court, and several attorney's from New Jersey.

The plaintiff contends that this ring has effectively frustrated consummation to his bankruptcy plan, and has cast obloquy upon the plaintiff's complaint and RICO Case Statement, is implicated in the scheme due to the Authority's demand for back taxes. See Complaint at ¶¶ 139-44. The MUA is also liable, it is averred, die to a letter written by one of its employees that contained allegedly false statements. See Complaint at ¶¶ 108-13.

The plaintiff originally filed this action in the Eastern District of Pennsylvania. It was transferred to this court in February of 1991. This motion followed.

II. DISCUSSION

A. Standard of Review

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b) (6),

this court must accept as true all well-pled allegations in the complaint and construe them in a light most-favorable to the plaintiff. See Rogin v. Bensalem Township, 616 F.2d 680, 685 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981). A court may not dismiss the complaint "unless it appears beyond doubt that the plaintiff con prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). When a pro se plaintiff is before the court, he is held to a less stringent pleading standard that ordinary litigants. See Todaro v. Bowman, 872 F.2d 43, 44 n.1 (3d Cir 1989).

B. The RICO Claim

Plaintiff contends in Count 18 of his complaint that the "[d]efendants have engaged in an illegal enterprise within the meaning of the Federal Racketeering

Influenzed [sic] Corrupt Organization statute." Complaint at ¶ 137. In the RICO case statement required by this court, the plaintiff points to a letter sent by an employee of the MUAs which was allegedly false and defamatory to support his contention that the MUA was involved in the the Bankruptcy ring conspiracy.

Under New Jersey law, a MUA is considered "the alter ego of the municipality and acts in the place of the municipality in discharging its function." Robertson v. Washington Township Mun. Util. Auth., 211 N.J. Super. 504, 508 (Law Div. 1986), aff'd, 215 N.J. Super. 239 (App. Div. 1987). The MUA, as the "public body politic... constituting a political subdivision of the State" is simply substituted for the Municipality itself when the MUA is performing its duties. **N.J. Stat. Ann.** 40:14B-20 (West 1991); see

also Browning-Ferris Industries, Inc. v. City of Passaic, 116 N.J. 83, 89 (1989) (noting that a MUA "has the power to act in the municipality's place concerning matters encompassed by the Law." (citation omitted)).

As the alter ego of the municipality itself, the same standard for determining liability of the municipality for alleged RICO violations shall apply to the MUA. In Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir.1991), the Third Circuit held that a municipal corporation could not be liable under the civil RICO statutes due to the mandatory imposition of treble damages should a violation be found. The Circuit wrote

> [w]e thus hold that a civil claim brought under section 1964(c) of the RICO Act, with its mandatory award of treble damages which are punitive in character, cannot be maintained against a municipal corporation. In

so doing, we iterate that we perceive no intention of Congress to abrogate the long-established and salutary principle of common law prohibiting punitive damages against municipalities.

ID. at 914. Given the considerations of this Circuit's reasoning, all RICO claims against the MUA will be dismissed.

C. Pendent State Claims

The claims remaining against the defendant MUA involve various State law grounds. In New Jersey, in order to sue a "public entity" for damages, a claimant must comply with the provisions of the New Jersey Tort Claims Act, **N.J. Stat. Ann. §** 59:1-1 et seq. (West 1982). The definition of public entity, for purposes of the Act, "is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions...."N.J. Stat. Ann. § 59:1-3, comment. Within the definitional ambit of "public entity" is a Municipal

Utility Authority. Accord Woodsum v. Pemberton, 172 N.J. Super. 489, 516-20 (Law Div. 1980), aff'd, 177 N.J. Super. 639 (App. Div. 1981) (holding the township and the MUA immune from suit under provisions to the New Jersey Tort Claims Act).

When a party seeks to initiate suit against a public entity pursuant to the Tort Claims Act. he must notify the entity within 90 days of the accrual of the cause of action. See **N.J. Stat. Ann. § 59:8-8 (a)**. If a claimant fails to notify the entity of the existing claim he

> may, in the discretion of a judge of the superior court, be permitted to file such notice at any time within 1 year after the accrual of his claim provided that the public entity has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion based upon affidavit showing sufficient reason for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act; provided that in no event may any suit against a public entity arising

under this act be filed later than two years from the time of the accrual of the claim.

N.J. Stat. Ann. § 59:8-9. "After the one-year limitation has passed, 'the court is without authority to relieve a plaintiff from his failure to have filed a notice of claim, and a consequent action at law must fail.'" Pilonero v. Old Bridge, 236 N.J Super. 529, 532-33 (App. Div. 1989), quoting Speer v. Armstrong, 168 N.J. Super. 251, 255-56 (App. Div. 1979).

Defendant MUA, in its motion for dismissal, offers a certification of Elizabeth Church, the Office Supervisor. In her certification, Ms. Church indicates that the MUA did not receive notice of the claim either directly or through the Attorney General's office. See Brief in Support at Exh.A. The first notice received was by way of the instant action.

Plaintiff's failure to comply with the notice provisions of the Tort Claims Act is fatal to his case against the MUA. Plaintiff has failed to offer any reason for his failure to comply with the provisions, and even were this court inclined to grant a discretionary extension, the plaintiff would be time-barred by the one-year limitations period. Therefore, defendant's motion to dismiss the pendent State Law claims will be granted.

III. CONCLUSION

IT IS THEREFORE ORDERED on this 9th day of December, 1991, that defendant Lower Township Municipal Utility Authority's motion to dismiss the complaint against it with prejudice is hereby **GRANTED.**

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JOSEPH H. RODRIGUEZ

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEROME B. SIMANDLE
UNITED STATES
MAGISTRATE

UNITED STATES COURT
COURT HOUSE, CAMDEN, NJ
08101

January 16, 1992

Re: Paul P. Slawek v. Gateway Broadcasting, Corp et al.,
Civil Number 91-838

LETTER OPINION AND ORDER

TO ALL LITIGANTS ON ATTACHED LIST:

Plaintiff, Paul Slawek, pro se, has filed a motion requesting leave to amend his complaint to add a count based and to accurately name certain corporate entities as defendants. Plaintiff based his original Complaint on allegations of defamation, conspiracy, and violations of the Civil RICO statute.

Plaintiff's original complaint names the Atlantic City Press and the Cape May Star and Wave as defendants in this action. According to plaintiff's supplemental

complaint these are trade names and hence , inappropriate. The plaintiff now claims that the proper parties are South Jersey Radio, Inc., the owner of the Cape May Star and Wave and South Jersey Publishing, Inc., the owner of the Atlantic City Press. This motion is unopposed and promotes the values of fairness and accuracy of litigation underlying Rule 15(a) Fed. R. Civ. P. and shall therefore be granted.

The plaintiff is also seeking leave to add a claim for relief under 42 U.S.C § 1983. While there is a liberal standard for allowing amendments to pleading, the Third Circuit has developed a standard of heightened specificity for § 1983 claims. In the current motion, plaintiff's amendment fails to identify the specific facts and details that comprise a violation of rights under 42 U.S.C. § 1983 as required by the Third Circuit.

Furthermore, without more specific facts that reveal when plaintiff's § 1983 claim ripened, a determination concerning the amendment's timeliness pursuant to Fed. R. Civ. P. 15(c) cannot be accurately made. For these reasons, Mr. Slawek's request for leave to add a § 1983 claim is being denied without prejudice to renewal if these pleading defects can be cured.

BACKGROUND

On February 25, 1991 Mr. Slawek filed a complaint alleging, among other things, a conspiracy by a group of lawyers, media representatives township officials and others. Plaintiff alleges that the conspiracy damaged his reputation and accused him severe financial injury.

Mr. Slawek is the managing partner of the Anchorage Inn in Cape May. At the time of the alleged events Mr. Slawek was a debtor in a Chapter 11 bankruptcy

proceeding. The bankruptcy was brought on by the heavy debt associated with the Anchorage. A reorganization plan was confirmed in June, 1990.

Plaintiff alleges the conspiracy sought to remove him from his position as managing partner of the Anchorage Inn. He alleges that defendants engaged in fraud, misrepresentation, libel, slander, malicious interference with business relationships and contracts, breach of contract, invasion of privacy and theft by deception as part of their conspiracy.

Mr. Slawek has named Lower Township officials, Lower Township Utility Authority, Anchorage Associates, Gateway Broadcasting Corp., Atlantic City Press, Cape May Star and Wave and various individuals as co-conspirators and defendants to the action.

In a December 9, 1991 Order, the Hon. Joseph H. Rodriguez granted the motion of the Lower Township Municipal Utility Authority to dismiss plaintiff's action as to that defendant. Plaintiff has appealed that decision.

Plaintiff based his original claim on the civil Racketeering in Corrupt Organizations ("RICO") statute, 18 U.S.C. §§ 1961 et seq. and pendent state law claims. Plaintiff now seeks leave to amend to properly identify the corporate parties and include a § claim.

DISCUSSION

1. Motion to Add a § 1983 Claim

Fed. R. Civ. P. 15(A), provides that leave to amend "shall be freely given when justice so require." In Foman v. Davis, 371 U.S. 178, 182 (1962), the Supreme Court articulated the liberal policy of allowing

amendments to pleadings underlying Rule 15(a) as follows:

> If the underlying facts or circumstances relied upon by a plaintiff may be proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reasons--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, Etc.--the leave sought should, as the rules require, be "freely given".

Under Foman, leave to amend may be denied where the proposed amendment is futile. Plaintiff's claim alleges broad violations of his rights arising out of an alleged conspiracy by a ring of actors operating out of the United States Bankruptcy Court in Camden and assisted by certain new media. The claim does not include specific allegation of the time, place and nature of the conduct that

deprived plaintiff of his rights (i.e. was it under the color of state law?). The claim also fails to identify whether the rights, privileges or immunities alleged to have been violated derive from the Constitution or federal law.

The Third Circuit has enunciated a rule requiring greater factual specificity in civil rights complaints in order to weed out frivolous and insubstantial cases. Plaintiff's proposed amended complaint does not satisfy this heightened standards as its allegations are overbroad and unsupported by specific factual assertions. Thus, it fails to state a non-frivolous claim upon which relief can be granted.

The "heightened specificity" requirement for § 1983 claims requires identification of the "specific conduct" alleged to violate the plaintiff's federal rights before a litigant can successfully

state a viable claim. Colburn v. Upper Darby Township, 838 F. 2d 663, 666 (3d Cir. 1988); District Council 47, AFSCME v. Bradley, 795 F.2d 310, 313-14 (3d Cir. 1986). Following Colburn, in order to comply with the Third Circuit's standard, § 1983 complaints must allege specific conduct violating the plaintiff's rights, the time and place of that conduct and the identity of the responsible officials. Id. The specificity rule has emerged from judicial efforts to balance the rights of civil rights claimants and the interests of public officials in not being subjected to vague or insufficient claims. Freedman v. City of Allentown 853 F. 2d 1111, 1114 (3d Cir. 1988).

This specificity rule has been further expanded by the Tenth Circuit in holding that conclusory allegations of conspiracy do not make out a viable Section 1983

conspiracy claim. Durre v. Dempsey, 869 F2d 543, 545 (10th Cir. 1989); Sooner Prods. Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983).[1]

In the current motion, the plaintiff has not alleged any specific facts or conduct that establishes a Section 1983 violation. The basis of Plaintiff's motion is contained in paragraphs 153-159 of the proposed amendment. These paragraphs make conclusory allegations about the defendant's actions and the plaintiff's deprivation of rights. As noted above, the amended complaint fails to identify the time, place and nature of the conduct alleged to deprive the plaintiff of his

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1. It should be noted that while there is a more liberal standard for pro se litigants bringing claims under § 1983, this standard does not relieve a plaintiff from the obligation to plead violations of his civil rights with specificity. Ressler v. Scheipe 505 F. Supp. 155, 156 (E.D. Pa., 1981); see also Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

rights. These conclusory allegations do not meet the standard of specificity needed to state a viable § 1983 claim in the Third Circuit.

Plaintiff's blanket assertion that the allegations in his original complaint are the basis for the additional § 1983 count is insufficient to satisfy the specificity standard. The original complaint does not contain allegations of specific conduct giving rise to a § 1983 violation. There is still no allegation of the specific rights deprived or the time and place of the deprivation. Thus, despite Mr. Slawek's incorporation of the allegations of the original complaint as the substance of his proposed § 1983 claim, the motion still falls far short of meeting either the Third Circuit's requirement for specificity or the Foman standard barring futile claims.

An additional deficiency of the amendment as filed is that is provides no basis for determining whether it complies with the appropriate statute of limitations for § 1983 claims. There is a mechanism for allowing pleadings to relate back to the time of the original filing of the complaint, see rule 15(c) Fed. R. Civ. P., but the plaintiff has not provided sufficient information from which a determination of this issue may occur. If the amended complaint does not arise out of the same common core of operative facts as required by Rule 15(c) and the statute of limitations has run, then the claim is time barred. Santana v. Holiday Inns, Inc., 686 F2d 736 (9th Cir. 1982). Because the amended complaint in the current motion included neither specific conduct nor specific dates it is impossible to determine if the amendment is timely or, in

the alternative, if it "relates back" pursuant to Fed. R. Civ. P. 15(c).

Because plaintiff's proposed amended complaint does not plead the conspiracy claims with the specificity required to withstand a dismissal motion under Rule 12 (b)(6), Fed. R. Civ. P., the conspiracy claim as presently proposed is futile and this court must deny the motion to amend under the Foman standard.

2. Motion to Accurately Name the Corporate Entities

A request for leave to amend to correct a misnomer of a party to the action is within the scope of Fed. R. Civ. P. 15 (a); 6 Wright and Miller, Federal Practice and Procedure § 1474. The defendant have filed no opposition to the plaintiff's motion to correctly identify the corporate defendants. Correct identification of the parties is consistent with the policy goals

of the Federal Rules as it promotes the procedural values of fairness and accuracy without unjustly burdening the defendants. Plaintiff's request for leave to amend to correctly name the defendants shall be granted, and plaintiff shall file and serve his amended complaint reflecting the above changes within 14 days of the date of the entry of this letter opinion and order.

CONCLUSION

Plaintiff's request for leave to add a § 1983 claim fails to meet either the Foman standard barring futile claims or the Third Circuit's standard requiring specific allegations of conduct when alleging such a violation and is accordingly denied without prejudice to its renewal if plaintiff meets the specificity requirements for pleading a § 1983 claim. In addition, without specific allegations of conduct, it is impossible to make a judgment concerning

the timeliness of the proposed claim. Moreover, plaintiff's request for leave to amend the complaint to properly identify the parties is granted, and plaintiff shall file and serve his amended complaint reflecting the proposed changes of corporate identities in line with the deadline outline above.

Finally, all litigants are reminded of the schedule stated in ¶ 4 of the Scheduling Order (filed April 19, 1991):

> Any dispositive motions addressing the complaint and/or amended complaint shall be filed within twenty (20) days after entry of the Order deciding plaintiff's motion to amend.

As this court has today decided the motion to amend, such dismissal motions are due within twenty (20) days, or not later than February 4, 1992.

Very truly yours,

JEROME B. SIMANDLE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL P. SLAWEK Plaintiff	:	Hon. Joseph H. Rodriguez
V.	:	Civil Action No. 91-838
GATEWAY BROADCASTING CORP. ET AL Defendants	:	ORDER

Rarely has this court heard such a uniform chorus of disapproval for a matter pending before it. The litigants have been accused of arguing "nonsense," and possessing merely a thimble-full of knowledge. And the defendants, obviously disgruntled, have hurled the derogatory term "contumacious" at the plaintiff.[1]

Of course, not to be lost within the maelstrom of emotions are the matters presently before the court. Defendants

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1. Webster's defines "contumacious" as "perverse in resisting authority; stubbornly disobedient." Webster's International Dictionary (3d.ed. 1961).

Joan Taylor, Daniel Hill, the Township of Lower, Michael Sinko, Cologne Wallace, Thomas Wallace, and Wallace's Anchorage Associates move to dismiss the complaint pursuant to **Fed. R. Civ. P.** 12(b)(6). Defendants Eric Browndorf, Paul Merkowki, James Hopson and the Atlantic City Press move for a judgment on the pleadings, pursuant to **Fed. R. Civ. P.** 12(c), or in the alternative for summary judgment pursuant to **Fed. R. Civ. P. 56.**

I. INTRODUCTION

The facts surrounding these parties have been outlined before by the court, and need not detain us for present purposes. The plaintiff is the former owner of a restaurant located in Cape May, New Jersey. The plaintiff purchased the restaurant with his wife in 1982 from the Wallace defendants. In 1988, allegedly due to an unsuccessful attempt to sell the business,

the plaintiff and his wife voluntarily filed a petition for reorganization in the bankruptcy court. Because of numerous problems with the reorganization, a trustee was appointed to oversee the implementation of the plan and, in the event of default, the liquidation of the property.

The plaintiff contends in his 36 page, 151 paragraph, 21 count complaint that the defendants all conspired to violate 18 U.S.C. § 1962 (c) & (d) (West 1984) (RICO). He further alleges that this RICO conspiracy has deprived him of this business opportunities, and caused him to suffer damages. The plaintiff "demands judgment against all [d]efendants jointly, severally and jointly, severally and jointly and severally..." in excess of $1,000,000.00.[2] These motions followed.

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2. In an ironic slip, the plaintiff's complaint states that the "[p]laintiffs' actions aa delineated above were malicious, hateful, shocking,

II. DISCUSSION

A. Standard of Review

1. Rule 12(b)(6)

When considering a motion to dismiss pursuant to Rule 12 (b) (6), a court must accept as true all well-pleaded allegations in the complaint view them in a light most-favorable to the plaintiff. See Rogin v. Bensalem Township, 616 F.2d 680, 685 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981). If, under any circumstances, the plaintiff would be entitled to relief, then a motion to dismiss should not be granted. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Williams v. Hepting, 844 F.2d 138, 140 (3d Cir. 1988). When a party is proceeding pro se, they are held to a less

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outragious, [sic] and intentional...." Complaint at ¶ 150.

stringent standard than the ordinary litigant, and are entitled to a liberal construction of the courts procedural rules. See Todaro v. Bowman, 872 F.2d 43, 44 n.1 (3d Cir 1989).

2. Rule 12(c)

Fed. R. Civ. P. 12 (c) provides, in pertinent part, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If... matters outside the pleadings are presented to an d not excluded by the court, the motion shall be treated as one for summary judgment...." As the Third Circuit has noted, "[under] [Rule] 12(c) as under [Rule] 12(b)(6), the trial court must view the facts in the pleadings in the light most favorable to plaintiff and must grant the motion only if the moving party establishes that no material issues of fact remains and that it

is entitled to judgment as a matter of law...." Shelly v. Johns-Manville Corp., 798 F.2d 93, 97 n.4 (3d Cir. 1986), citing Society Hill Civic Assoc. v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980).

This court will not consider matters outside the pleadings, and therefore will treat the Rule 12(c) motions as the functional equivalent to the motions to dismiss for failure to state a claim. Therefore, the standard to be applied is identical. See id.

B. The RICO Claims

1. Civil RICO

The Racketeer Influenced Corrupt Organizations Act provides, in pertinent part, that

> (c) [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs

> through a pattern of racketeering activity....

18 U.S.C. § 1962 (c) (West Rev. ed. 1991). Subsection (d) further provides "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962 (d).

The statute defines racketeering activity as, inter alia,

> any act which is indictable under any of the following provisions of title 18, United States Code:... Section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud),...[and] Section 1503 (relating to obstruction of justice),.....

18 U.S.C. § 1961. Although criminal penalties are provided for, Section 1964(c) permits "[a]ny person injured in his business or property by reason of a violation of Section 1962..." to maintain a suit in district court. 18 U.S.C.§ 1964(c). The statute also provides for

mandatory treble damages, plus costs and fees. See id.

The plaintiff alleges that the defendant collectively violated the statue in a number of ways. He primarily contends that the defendant Browndorf violate the statute by mailing "fraudulent invoices to the plaintiff and ... submit[ting]numerous false affidavits and certifications to the plaintiff, other attorneys, the Bankruptcy Court and the District Court...." RICO Case Statement at 10. These mailings, it is offered, satisfy the requirements to impose liability.[3]

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3. The remaining defendants are implicated in the scheme in a number of tangential ways. The defendant Gatewas Broadcasting is allegedly implicated by its broadcasting a story about the plaintff the defendant allegedly knew to be false. See RICO Case Statement at 11. This broadcase was intended to injure the plaintiff in his re-organization efforts. Id. The Atlantic City Press is charged with the same acts and intent, but utilized a newspaper article for the putative unlawful end.

The Wallace defendants are implicated due to their alleged fabrication of the facts of the plainitiff's bankruptcy proceeding, and by way of

It is axiomatic that in order to prove a violation of RICO, a plaintiff must establish "a pattern of racketeering activity...." H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 2900 (1989). As the Court noted in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) "'[t]he target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is

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their transmittal of these false statements to the various media defendants. Id. at 20.

The Township of Lower and Joan Taylor arenamed as co-conspirators by virtue of their assistance in the nature of submitting false statement of a tax delinquency to the bankruptcy court. Id. at 31. This allegedly false information was then transmitted to various other defendants to further the illegal plan.

In outling the acts above, it is important not to lose sight of the alleged purpose of this monstrously detailed and intricate plan; namely, "to damage the plaintiff and interfere with his reorganization...." Id. at passim.

this factor of continuity plus relationship which combines to produce a pattern...." (quoting D. Rep. No. 91-617, p. 159 (1969)) (emphasis added).

In attempting to clarify the talismanic phrase "continuity plus relationship," the Court observed "RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff... must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity....H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 2900 (1989).

> A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not

> satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct....

Id. at 2902.

The Third Circuit, in trying to evaluate the pattern requirement, indicated that certain variables should be considered by a court in deciding whether a "pattern" exists. These factors include "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity...." Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987).

These factors, excluding the similarity of the unlawful acts are "in greater and lesser degrees, relevant to the issue of continuity...." Marshall-Silver Construction Co. v. Mendel, 894 F.2d 593, 595 n.1 (3d Cir. 1990).

Given the guidance described above, the ineluctable conclusion is that the plaintiff has failed to satisfy RICO's "pattern requirement, and his complaint must therefore fail.

The primary actor in the plaintiff's complaint is the defendant Eric Browndorf. The plaintiff suggests that Browndorf repeatedly made false statements to the bankruptcy court and submitted fraudulent certifications. Plaintiff also alleges that the defendant used the mail and the phone to communicate his fraudulent activity.

Accepting as true the plaintiff's accusations, the existence of a "pattern" is absent. There was but one alleged victim in this scheme, namely the plaintiff. The entire scheme, if it is believed, was crested for the purposes of driving the plaintiff out of business and

exploiting the business that was developed.[4] See RICO Case Statement at 5-

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4. The plaintiff, in an apparent attempt to dodge this conclusion, states in his RICO Case Statement that other victims are his wife and

> [o]ther [d]ebtors and [c]reditors. THe activities complained of herin are commonplace int eh Bankruptcy Court. Evidence reviewed by plaintff indicated this ring has been operating in this particular court for every year of the three yearts studied by plaintiff. IN the years 1988, 1989 and 1990 Judge Wizmur issued 3 published opinions. This is the lowest number of any Bankruptcy Judge in the nation. It indicates a high degree of cooperation in the court amoung attorneys. Since legal fees are in essencee set by attorneys themselves, there is a high degree of motivation for the attorneys to avoid disputes and therefore matters are settled by the members of the 'ring' and not the court. Membewrs of the 'ring' suspport each others' inflated fee applications....

RICO Case Statement at 39-40.

Pure speculation and conjecture cannot support a claim for damages, nor does it suffice for purposes of satisfying RICO's requirements. Accord Gott v. Simpson, 745 F. Supp. 765, 770 (D. Me. 1990) (holding that claims that are "entirely conslusory" do not satisfy Fed. R. Civ. P. 9(b)'s specificity requirement, and dismissing the complaint without providing an oppourtunity to amend).

Plaintiff;s attempt to elevate this allegeldy unlawful conduct as a "pattern" that infects every court proceeding does not pass muster. Certainly, "independent investigations" by named plaintiffs cannot be a basis for denying a motion to dismiss.

10; supra note 3. The activity of the defendant does not pose a greater societal threat of the sort to be redressed through RICO. Rather, this case, if believed, is a "'garden variety' business fraud..." and not actionable under RICO. Barticheck, 832 F.2d at 40.

This holding stands true for the remaining defendants as well. Every act complained of relates strictly to this one plaintiff, and the plaintiff cannot show how the nefarious scheme has a bigger social impact. Accord Marshall-Silver, 894 F.2d at 597.

The holding in no way suggests that the absence of a "greater harm" precludes recovery under RICO. It merely follows where Congress and the Third Circuit have gone before and avoids the impositions of

the "draconian" penalties in cases that are allegedly "merely fraud." See id. at 597.[5]

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED on this 13th day of May, 1992, that the defendants' motions to dismiss and for judgment on the pleadings are **GRANTED**, and the complaint is **DISMISSED**.

IT IS FURTHER ORDERED that the plaintiff's motion for a change of venue is **DENIED.**

JOSEPH H. RODRIGUEZ

U.S.D.J.

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5. The only basis for this court's jurisdiction is the RICO claim. THe remaining claims, sounding in state law, will not be reached by the court, and this court will not exercise its supplemental jurisdiction. See 28 U.S. C. § 1367 (West Rev. ed. 1991).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-5277

PAUL P. SLAWEK
Appellant
v.

GATEWAY BROADCASTING CORPORATION; ATLANTIC CITY PRESS, CAPE STAR AND WAVE; JOY 105 RADIO WBNJ; WALLACES ANCHORAGE ASSOCIATES; TOWNSHIP OF LOWER, NEW JERSEY; LOWER TOWNSHIP UTILITY AUTHORITY; THOMAS WALLACE, AND HIS WIFE; GEORGE WALLACE, AND HIS WIFE; DANIEL HILL; JOHN HOBSON; ERIC BROWNDORF; MICHAEL SINKO; PAUL MERKOSKI; BILL HUF; SCOTT RALPH COOPER; JAMES FITZPATRICK

Appeal from the United States District Court For the District of New Jersey
(D.C. Civil No. 91-00838)
District Judge: Hon. Joseph H. Rodriguez

Submitted Pursuant to Third Circuit Rule 12(6) January 22, 1993

BEFORE: SCIRICA, STAPLETON, and LEWIS, Circuit Judges

(Opinion filed FEB 26, 1993)

MEMORANDUM OPINION OF THE COURT

Appendix F

STAPLETON, Circuit Judge:

We read the district court's order entered on May 14, 1992, as disposing of all remaining claims in this case. Accordingly, it is an appealable final order.

The scandalous and conclusory allegations set forth in appellant's brief before us bear no resemblance to the allegations of his amended complaint. That complaint, insofar as RICO is concerned, alleges an enterprise limited to one victim and one objective, i.e., appellant and the removal of appellant from participation of any kind in an identified restaurant business. It was for this reason that the district court ruled that appellant had failed to allege a pattern of racketeering activity and properly granted the appellees' motion to dismiss the RICO claim for failure to state a claim upon which relief could be granted. Cf. Marshall-

Silver Construction Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990).

The amended complaint alleges non-RICO claims against South Jersey Publishing Company, a Pennsylvania corporation. Since appellant is also a citizen of Pennsylvania, the district court had no diversity jurisdiction to hear appellant's case. Having dismissed appellant's only federal claim, the district court properly declined to exercise supplemental jurisdiction. See 28 U.S.C. § 1367.

We have considered appellant's other contentions and find them to be without merit.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

Walter Stapleton
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-5277

PAUL P. SLAWEK
Appellant

v.

GATEWAY BROADCASTING CORPORATION; ATLANTIC CITY PRESS, CAPE STAR AND WAVE; JOY 105 RADIO WBNJ; WALLACES ANCHORAGE ASSOCIATES; TOWNSHIP OF LOWER, NEW JERSEY; LOWER TOWNSHIP UTILITY AUTHORITY; THOMAS WALLACE, AND HIS WIFE; GEORGE WALLACE, AND HIS WIFE; DANIEL HILL; JOHN HOBSON; ERIC BROWNDORF; MICHAEL SINKO; PAUL MERKOSKI; BILL HUF; SCOTT RALPH COOPER; JAMES FITZPATRICK

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WALTER STAPLETON

Circuit Judge

Dated: April 7, 1993

TITLE 18 s 1961

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, ..; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1341 (relating to mail fraud)...section 1510 (relating to the obstruction of justice)...section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity)..

TITLE 42 s 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix I

TITLE 28. s 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between--

(1) citizens of different States;...

(4c) For the purpose of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business...

Appendix J

CONSTITUTION OF THE UNITED STATES

ARTICLE III SECTION 2,

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, of the Citizens thereof, and foreign States, Citizens or Subjects.

Appendix K

PROOF OF MAILING

I, Paul Slawek, hereby certify that I mailed 3 copies of this Petition for Writ of Certiorari to the following individuals this 6th day of June, 1993, by placing the same in the mail with proper postage affixed.

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Dated: 6/2/98

Supreme Court, U.S.
FILED
SEP 7 1993
CLERK

No. 93-216
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PAUL P. SLAWEK,

PETITIONER

v.

GATEWAY BROADCASTING CORP., ET AL,

RESPONDENTS

BRIEF OF THE RESPONDENTS ERIC BROWNDORF, THE TOWNSHIP OF LOWER, DANIEL HILL, JOAN TAYLOR, THE ATLANTIC CITY PRESS, JAMES HOPSON AND PAUL MERKOSKI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT

THE QUESTIONS PRESENTED BY THE PETITIONER DO NOT FAIRLY REFLECT THE FACTS IN THIS CASE AND DO NOT ARISE OUT OF THE RECORD BELOW. 7

A. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE PLAINTIFF'S ALLEGATIONS OF A RICO VIOLATION. 8

B. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE REMAINDER OF THE PLAINTIFF'S COMPLAINT. 13

C. PLAINTIFF'S COMPLAINT NEVER INCLUDED A CIVIL RIGHTS CLAIM AND THE DENIAL OF THE MOTION TO AMEND WAS NEVER PRESERVED FOR APPEAL. 14

CONCLUSION 15

TABLE OF CITATIONS

PAGE

Aeropulse, Inc. v.
Armstrong & Brooks Ltd.,
740 F. Supp. 938 (E.D.N.Y. 1990) 9

Bartichek v.
Fidelity Union Bank/First National Bank,
832 F.2d 36, 39 (3rd Cir. 1987) 9, 11

Bock & Sons, Inc. v.
U.S. Realty, Inc.,
1990 W.L. 50771, Rico Business Guide
¶ 7496 (E.D. Pa. April 20, 1990) 11

Enzo Biochem, Inc. v.
Johnson & Johnson,
1990 W.L. 136038, RICO Business Guide
¶7571 (S.D.N.Y. September 12, 1990) 12

Erie Railroad Company v.
Kirkendall,
266 U.S. 185, 185-186 (1924) 7

Evanston Bank v.
Conticommodity Services, Inc.,
623 F. Supp. 1014, 1025 (M.D. Ill. 1985) 11

Genty v.
Resolution Trust Corporation,
937 F.2d 899 (3d. Cir. 1991) 10

TABLE OF CITATIONS CONTINUED

PAGE

Grafman v.
Century Broadcasting Corp.,
743 F. Supp. 544 (N.D. Ill. 1990) 12

H. J. Inc. v.
Northwestern Bell Telephone Co.,
492 U.S. 229 (1989) 10, 11

Sedima, S.P.R.L. v.
Imrex Co.,
473 US 479, 496 (Note 14) (1985) 10

Southern Power Company v.
North Carolina Public Service Company,
263 U.S. 508, 509 (1924) 7

Stavriotis v.
Gerald Litwin,
1986 W.L. 12005 (N.D. Ill. 1986) 12

United Steelworkers of America v.
New Jersey Zinc,
828 F.2d 1001, 1007-1008 (3rd Cir. 1987) 15

RULES AND STATUTES

PAGE

18 U.S.C. § 1343 11

18 U.S.C. § 1961 11

18 U.S.C. § 1962 (1984) 9

18 U.S.C. § 1964(c) (1984) 12

18 U.S.C. § 1341 11

28 U.S.C. § 32 14

42 U.S.C. § 1983 4

Fed. R. Civ. P. 12(b)(6) 4

Fed. R. Civ. P. 12(c) 5

Fed. R. Civ. P. 56 5

Fed. R. Civ. P. 72(a) 15

N.J. Fed. Prac. R 40D(4) 15

Rule 15.1 7

Respondents, Eric Browndorf, the Township of Lower, Daniel Hill, Joan Taylor, The Atlantic City Press, James Hopson, and Paul Merkoski respectfully submit that the Petition filed on behalf of Paul B. Slawek for a Writ of Certiorari should be denied and that this Court should not grant review of the determinations made in the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

This is a case in which the petitioner, Paul Slawek, who had been a debtor in a Chapter XI bankruptcy proceeding, alleges the existence of an elaborate and far-reaching conspiracy among the press, the government, attorneys, and the United States Bankruptcy Court, to destroy petitioner's restaurant business, defame him, prevent him from successfully practicing law in the State of New Jersey after graduation from law school, and to inflict emotional distress and physical illness upon him.

Plaintiff's claim appears to have its origins in a transaction taking place in September of 1982, when he and his wife purchased a restaurant known as "The Anchorage" from Mr. and Mrs. Thomas Wallace, Mr. and Mrs. George Wallace, and Wallace's Anchorage Associates. Slawek gave the Wallaces a purchase money mortgage on the premises. He claims that after taking over the business, he "rejuvenized" and reorganized it. He alleges that the Wallaces, who were now "resentful" of the business's prosperity, began to conspire with a number of

other persons to force Slawek out and to regain control of the business. Slawek alleges that in early 1988 he entered into an agreement to sell the business for $1,450,000, or almost three times his purchase price. He claims that the sale fell through, but that the business liquor license was erroneously transferred to the prospective buyer, and that this caused the business to experience severe financial difficulties. Slawek claims that as a result of these financial difficulties, he caused a Chapter 11 petition in bankruptcy to be filed in the United States Bankruptcy Court in Camden, New Jersey, on October 6, 1988. He states that the case was then assigned to United States Bankruptcy Court Judge Judith Wizmur. The Wallaces, to protect their rights as against Slawek and his business, retained attorney Eric Browndorf to represent their interests.

Slawek contends that Mr. Browndorf was a "regular" at the Bankruptcy Court in Camden, and on "good terms" with Judge Wizmur. According to plaintiff, the Wallaces and their wives, together with Browndorf, and with the active aid and abeyance of Judge Wizmur, carried out a conspiracy utilizing "fraud, misrepresentations, the submission of false legal bills, liable, slander, invasion of privacy, the submission of false affidavits and false certifications to the Court, interference with plaintiff's business relationships and breach of contract, the purpose of which was to destroy plaintiff's reputation and destroy plaintiff's business, acquire plaintiff's interest in a family partnership, remove plaintiff from his management position within the partnership and acquire valuable real estate and to derive other personal profits at the expense of the plaintiffs."

Slawek claims that the Wallaces and Browndorf somehow convinced the news media, including the Atlantic City Press and radio station WBNJ, to print and broadcast false reports about the plaintiff alleging that he was illegally operating boat slips on property owned by the government. In fact, Slawek conceded in his complaint that a "large number" of boat docks were built "without the necessity of permits" upon a parcel of property which he admittedly does not own, and the title to which is actually in either the State of New Jersey or the government of the United States.

The involvement of the Township of Lower, a municipality located in Cape May County, New Jersey, and its zoning officer, Daniel Hill, and tax collector, Joan Taylor, is less than clear. The allegations in this alleged "conspiracy" against the Township are based solely on the theory of respondeat superior. As to the two individual Township employees, plaintiff alleged in conclusory, non-specific fashion that defendants Hill and Taylor assisted the Wallace defendants by allegedly releasing false information about the plaintiff to the bankruptcy court and the media defendants. This allegedly "false" information concerned plaintiff's failure to secure dock permits and his failure to pay taxes, all of which plaintiff admitted to in his complaint.

The plaintiff's complaint was filed in the United States District Court for the Eastern District of Pennsylvania on September 10, 1990. The District Court's jurisdiction was originally based upon federal question jurisdiction under 28. U.S.C. 1331 and diversity of citizenship under 28 U.S.C. § 1332, the plaintiff being a citizen of Pennsylvania and defendants allegedly being citizens of New Jersey.

However, as is set forth herein, plaintiff thereafter destroyed diversity jurisdiction when he filed his amended complaint leaving only federal question jurisdiction as the basis for the District Court's jurisdiction.

On January 18, 1991, an order was entered dismissing all counts of the complaint alleging jurisdiction by reason of diversity against the defendant Atlantic City Press, the trade name for a Pennsylvania Corporation, South Jersey Publishing Company, dismissing all counts of the complaint against the defendant "JOY 105" Radio WBNJ, and transferring venue to the United States District Court for the District of New Jersey, with the consent of the plaintiff.

On December 9, 1991, the United States District Court for the District of New Jersey entered an order granting the motion of the defendant Lower Township Municipal Utility Authority to dismiss the complaint of the plaintiff as against it pursuant to Fed. R. Civ. P. 12(b)(6). By order dated January 16, 1992, that Court denied the motion of the plaintiff to amend his complaint so as to add additional claims arising under 42 U.S.C. § 1983. The said order permitted plaintiff to amend his complaint to name the corporate entity for the Atlantic City Press, South Jersey Publishing Company, a Pennsylvania Corporation. Plaintiff incorporated by reference in his amended complaint all allegations (all 151 paragraphs) and prayers for relief of his original complaint including his state law claims.

Subsequently, the defendants Joan Taylor, Daniel Hill, the Township of Lower, Michael Sinko, Colleen Wallace, Thomas Wallace, and Wallace's Anchorage Associates moved to dismiss the complaint of the plaintiff pursuant to Fed. R. Civ. P. 12(b)(6). At the same time,

the defendants Eric Browndorf, Paul Merkoski, James Hobson, and the Atlantic City Press moved for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c) or in the alternative for summary judgment pursuant to Fed. R. Civ. P. 56. By Order dated May 13, 1992, the United States District Court granted all of the defendants' motions to dismiss and for judgment on the pleadings. The same order also denied the plaintiff's motion to change venue back to the United States District Court for the Eastern District of Pennsylvania.

In its May 13, 1992 decision, the District Court examined the federal RICO claim as stated in the complaint of the plaintiff and as elaborated in more detail in plaintiff's RICO case statement. The Court found that the plaintiff had failed to satisfy the "pattern" requirement of RICO, and that the cause of action was therefore deficient as a matter of law. The Court went on to conclude that as this federal question was the only basis for the Court's jurisdiction, the remaining state claims would also be dismissed. Because of this conclusion by the District Court, it did not consider the separate arguments raised by the defendants in their motion for judgment on the pleadings, motion to dismiss or summary judgment. In support of those motions, the defendants enumerated the substantive deficiencies in all of the remaining state law causes of action pleaded by the plaintiff.

Slawek filed an Appeal with the United States Court of Appeals for the Third Circuit. In an opinion filed February 26, 1993, the Court of Appeals unanimously affirmed the Order of the United States District Court, dismissing Slawek's Complaint. The Court of Appeals observed in that opinion that "the scandalous and conclusory allegations set forth in appellant's brief before

us bear no resemblance to the allegations of his Amended Complaint." (F2.)[1] The Court of Appeals went on to observe that the petitioner's amended Complaint alleged non-RICO claims against South Jersey Publishing Company, a Pennsylvania corporation. As petitioner is also a citizen of Pennsylvania, the District Court had no diversity jurisdiction to hear his claim. Having dismissed the appellant's only federal claim (under RICO), the District Court therefore "properly declined to exercise supplemental jurisdiction." (F3.) A sur-petition for rehearing by Slawek was denied by the United States Court of Appeals for the Third Circuit, en banc, by Order dated April 7, 1993. (G2.)

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[1]All references are to the appendices annexed to the petition for certiorari.

REASONS FOR DENYING THE WRIT

THE QUESTIONS PRESENTED BY THE PETITIONER DO NOT FAIRLY REFLECT THE FACTS IN THIS CASE AND DO NOT ARISE OUT OF THE RECORD BELOW.

The Court of Appeals for the Third Circuit observed that the "scandalous and conclusory allegations set forth in appellant's brief" did not bear any "resemblance to the allegations of his Amended Complaint." (F2.) The same must be said of the petition for certiorari. An examination of the pleadings and of the opinions of the courts below demonstrates how loose and groundless are the claims which make up petitioner's proposed issues on certiorari. This is in direct contrast to the requirement that a petitioner supply "clear, definite and complete disclosures concerning the controversy when applying for certiorari [citations omitted]." Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508, 509 (1924). Under Supreme Court Rule 15.1, the respondent is obligated to point out misstatements of fact and law in the petition so that a writ is not mistakenly granted, only to learn upon full consideration of the record that the issues presented cannot be decided. Erie Railroad Company v. Kirkendall, 266 U.S. 185, 185-186 (1924). It is therefore necessary to examine the "questions" presented by the petitioner in light of the actual circumstances in this case.

A. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE PLAINTIFF'S ALLEGATIONS OF A RICO VIOLATION.

As petitioner moves from court to court, his allegations of a conspiracy against him become more far-reaching and fanciful. At the same time, petitioner has abandoned any pretense of relying upon the record below. Thus, his Petition for Certiorari contains allegations of a "perfect scheme" being carried on in Camden Bankruptcy Court, and warns that there is "no greater threat to our society" than the corruption of our judicial system. (Petition at 18-19.) Petitioner speaks loosely of there being multiple victims of a RICO scheme in this case, and indeed, that the scheme imperils our entire society. His wild contentions are wholly belied by the pleadings actually submitted by the Petitioner to the trial court.

For example, in his responsive papers dated November 3, 1990, he stated that "plaintiff's complaint seeks damages as a result of those injuries sustained solely by the plaintiff and not by any other entities." (Emphasis in the original.) Slawek's belated attempt to manufacture multiple, unnamed "victims" of the supposed "bankruptcy ring" therefore flies in the face of the representations he himself made to the trial court.

As the United States District Court Judge observed in his decision dismissing plaintiff's Complaint:

> Accepting as true the plaintiff's accusations, the existence of a "pattern" is absent. There was but one alleged victim in this scheme, namely the plaintiff. The entire scheme, if it is believed, was

> created for the purposes of driving the plaintiff out of business and exploiting the business that was developed. See, RICO Case Statement at 5-10; supra, note 3. The activity of the defendant does not pose a greater societal threat of the sort to be redressed through RICO. Rather, this case, if believed, is a "'garden variety' business fraud. . ." and not actionable under RICO. Barticheck, 832 F.2d at 40. (Footnote excluded.) (E12-E14.)

Although it was not necessary for the District Court to reach other issues, it is respectfully submitted that there are numerous other ways in which the plaintiff's RICO complaint was deficient, and which would also have supported its dismissal.

In order to prove a RICO violation, a plaintiff must establish: (1) that the defendant, through the commission of two or more predicate acts, (2) constituting a "pattern", (3) of "racketeering activity", (4) directly or indirectly invests in, or maintains an interest in, or participates in an "enterprise", (5) the activities of which affect interstate or foreign commerce. 18 U.S.C. § 1962 (1984); See also Aeropulse, Inc. v. Armstrong & Brooks Ltd., 740 F. Supp. 938 (E.D.N.Y. 1990).

Although a number of deficiencies in the plaintiff's RICO allegations were pointed out in the various motions of the defendants,[2] the District Court first addressed the threshold issue of whether the plaintiff had established "a pattern of racketeering activity. . . ." H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, (1989). As observed in Sedima, S.P.R.L. v. Imrex Co., 473 US 479, 496 (Note 14) (1985) RICO is not directed at "sporadic" but continuing activity. "It is this factor of continuity plus relationship which combines to produce a pattern. . . ." The District Court quoted from the recent decision of the Supreme Court in H. J. Inc., that:

> A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy its requirement: Congress was concerned in RICO with long-term criminal conduct. . . . Id. at 2902.

The Court went on to observe that controlling precedent in this Circuit requires an evaluation of a number of factors. These include "the number of unlawful acts, the length of time over which the acts were

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[2]For example, a RICO claim cannot be maintained against the Township of Lower and the Lower Township Municipal Utilities Authority since they are both governmental entities. Genty v. Resolution Trust Corporation, 937 F.2d 899 (3d. Cir. 1991).

committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. . . ." Bartichek v. Fidelity Union Bank/First National Bank, 832 F.2d 36, 39 (3rd Cir. 1987).

A "pattern of racketeering activity" is defined in 18 U.S.C. § 1961 as "at least two acts" of prohibited conduct within a ten year period. These "predicate acts", in turn, are defined as including specifically enumerated federal criminal offenses, such as mail fraud (18 U.S.C. § 1341), and wire fraud (18 U.S.C. § 1343).

In the context of a mail or wire fraud case, the plaintiff must show precisely which defendant caused what to be mailed when, what false statements were made, and how the mailing or interstate communication furthered the fraudulent scheme. Bock & Sons, Inc. v. U.S. Realty, Inc., 1990 W.L. 50771, Rico Business Guide ¶ 7496 (E.D. Pa. April 20, 1990). Moreover, the plaintiff must demonstrate that the mailing or interstate communication was at least incidental to an essential part of the scheme. Evanston Bank v. Conticommodity Services, Inc., 623 F. Supp. 1014, 1025 (M.D. Ill. 1985).

In H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), the Supreme Court found that to establish a RICO pattern the predicate acts must be (1) related, and, (2) amount to, or otherwise constitute a threat of racketeering activity. Id. at 240. The Court also determined that the mere fact that two or more predicate acts are committed in furtherance of a fraudulent scheme is not by itself sufficient to establish a RICO pattern. Id.

Plaintiff must also allege that his injuries were the result of the defendants' investment of racketeering income in an enterprise. Moreover, a plaintiff must prove that he was injured in his business or property "by reason" of the violation. 18 U.S.C. § 1964(c) (1984). The "by reason of" language requires a plaintiff who brings a civil RICO action to show how a RICO violation caused his injury. Grafman v. Century Broadcasting Corp., 743 F. Supp. 544 (N.D. Ill. 1990). The plaintiff must also demonstrate that the alleged injury was actually and proximately caused by the predicate acts that formed the pattern of racketeering activity. Enzo Biochem, Inc. v. Johnson & Johnson, 1990 W.L. 136038, RICO Business Guide ¶ 7571 (S.D.N.Y. September 12, 1990). Proximate cause will be found if the predicate acts are a substantial factor in bringing about the plaintiff's injury and if the injury is reasonably foreseeable or anticipated as a natural consequence.

Courts have also properly dismissed civil RICO cases, such as the present, filed by bankruptcy debtors against creditors, or others involved in the bankruptcy proceedings, for failure to allege two predicate acts, a pattern of such predicate acts, or an enterprise. See Stavriotis v. Gerald Litwin, 1986 W.L. 12005 (N.D. Ill. 1986). Communications to the bankruptcy court, or those relevant to its proceedings, are not predicate acts.

The facts as stated by plaintiff failed to meet the requirements of civil RICO. All alleged facts involve one plaintiff, one property, and one transaction, namely, the sale of the Anchorage Inn and the resulting bankruptcy proceedings. More importantly, these alleged acts occurred in a few months and do not pose a threat of "continuing" racketeering activity.

Where plaintiff's complaint and RICO case statements were so clearly deficient, plaintiff's complaint was properly dismissed as a matter of law. Plaintiff has produced no facts which would create a fact question. Accordingly, the plaintiff's allegations under RICO could properly have been subjected to dismissal on the pleadings for numerous other reasons in addition to those articulated by the District Court Judge.

B. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE REMAINDER OF THE PLAINTIFF'S COMPLAINT.

The Petitioner continues to insist that the courts below erred in concluding that there was no diversity jurisdiction in this case, but neglects to point to any error in the specific findings of the Court of Appeals on this issue. The Petitioner concedes that he is a Pennsylvania resident and that the defendant Atlantic City Press is an entity owned by the South Jersey Publishing Company, which is a Pennsylvania corporation (Petition at 22). Petitioner also recites the fact that by Order dated January 18, 1991, he was allowed to dismiss his Complaint as to the individual defendant in order to "preserve" diversity jurisdiction. The Petitioner's Amended Complaint, however, subsequently brought that non-diverse party back into the litigation. That is, Petitioner's Amended Complaint of January 29, 1992, explicitly renamed South Jersey Publishing Company as a defendant and incorporated by specific reference each and every allegation set forth in paragraphs 1 through 151 of the original Complaint. In doing so, the Petitioner voluntarily recommenced all of his causes of action against the non-diverse defendant. The plaintiff is therefore

clearly precluded from invoking the jurisdiction of the Federal Courts pursuant to diversity of citizenship. 28 U.S.C. § 32. The Petitioner's argument that his Amended Complaint actually means something other than what it clearly states is akin to his argument that his fanciful RICO conspiracy allegations on appeal are also actually part of the record in this case.

C. PLAINTIFF'S COMPLAINT NEVER INCLUDED A CIVIL RIGHTS CLAIM AND THE DENIAL OF THE MOTION TO AMEND WAS NEVER PRESERVED FOR APPEAL.

Although not listed in the "questions presented" portion of the Writ for Certiorari, plaintiff states in his argument that his original complaint sounded in violation of 42 U.S.C. § 1983 and that his claim under § 1983 should not have been dismissed. This is yet another example of plaintiff's fast and loose interpretation of the facts and record below. Not only did plaintiff's original complaint never allege a § 1983 violation, he never argued below that it did. Hence, in his motion for leave to amend the complaint to name the South Jersey Publishing Company, plaintiff included a request for leave to allege a violation under 42 U.S.C. § 1983. The motion to add a count under 42 U.S.C. alleged a non-specific, conclusory count against all defendants (even the non-governmental defendants) and was properly denied without prejudice by the Magistrate Judge by Order dated January 12, 1992.

The Third Circuit summarily rejected plaintiff's appeal of this order as "without merit", presumably since plaintiff waived his right to appeal by failing to file an

appeal of the Magistrate's Order to the District Court within ten days as required by Fed. R. Civ. P. 72(a) and Rule 40D(4), of the New Jersey Federal Practice Rules. See also, United Steelworkers of America v. New Jersey Zinc, 828 F.2d 1001, 1007-1008 (3rd Cir. 1987) (where no appeal is taken to the District Court from a Magistrate's nondispositive order, the issue will not be preserved for a later appeal to the Circuit Court).

CONCLUSION

The issues raised by the petitioner in his application for a Writ of Certiorari are not founded in the record. The plaintiff's complaint, even as clarified and explained by his RICO case statement, fails to set forth an actionable claim under RICO. The allegations in Slawek's brief to the United States Court of Appeals, and in his petition for Certiorari, bear no resemblance to those contained in his amended complaint. That same amended complaint clearly alleges non-RICO claims against a defendant Pennsylvania corporation, South Jersey Publishing Company. As Slawek is himself admittedly a citizen of Pennsylvania, no separate jurisdictional grounds, based upon diversity, were present. With the dismissal of the plaintiff's only federal claim, based upon RICO, the District Court therefore did not err in declining to exercise supplemental jurisdiction, and in dismissing the remainder of the case in its entirety.

For each of the reasons enumerated herein, therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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